No. 02-530

IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, *et al.*,
Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT FORD MOTOR COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The court of appeals held that this proposed nationwide class action fails to satisfy the commonality and manageability requirements of Rule 23 because the materially different laws of 51 jurisdictions would apply to the claims of putative class members, and because the many different configurations of tires and vehicles at issue precluded uniform, classwide treatment of all tires and vehicles. The questions presented are:

1. Whether certiorari should be granted to review the court of appeals' determination that, under Indiana choice-of-law rules, petitioners' tort and contract claims would be governed by the laws of the 51 jurisdictions in which the claimants' vehicles were purchased and used, rather than by the laws of the manufacturers' home states.

2. Whether certiorari should be granted where petitioners fail to seek review of the court of appeals' independently dispositive holding that variations among the tires and vehicles at issue preclude the finding of factual commonality necessary to adjudicate petitioners' product defect claims on a classwide basis.

RULE 29.6 DISCLOSURE

Respondent Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition for certiorari in this case is entirely without merit. Petitioners all but ignore the essence of the decision below: a straightforward, uncontroversial application of the choice-of-law rules of Indiana. The court's core holding turns entirely on that purely state-law issue, and nothing about it warrants review by this Court.

The choice-of-law issue arose when petitioners filed in the U.S. District Court for the Southern District of Indiana a master complaint seeking certification of two nationwide classes of purchasers of Ford vehicles and Bridgestone/Firestone tires. The complaint alleged tort and contract claims for economic injuries suffered "at the instant" petitioners purchased their vehicles and tires in the 50 states and the District of Columbia. Pet. 4. That presented a serious problem for class certification. Under Indiana's unexceptional choice-of-law rules, petitioners' consumer purchase claims would be governed by the law of the place of purchase – here, by the laws of every United States jurisdiction. And because the relevant tort and contract laws vary substantially across jurisdictions, it was evident that petitioners' could not satisfy the requirements of Rule 23(a) and Rule 23(b)(3) that the claims in the class present predominately common legal issues.

Petitioners attempted to argue that the tort and contract laws of all 51 jurisdictions are sufficiently similar to satisfy Rule 23's legal commonality requirements. The district court rejected that argument. But petitioners also suggested an alternative route to commonality: a bizarre reading of Indiana choice-of-law rules that would make the law of the manufacturer's home jurisdiction applicable to any tort or contract claim arising out of a consumer purchase, such that, for example, Korean law would govern the sale of a Hyundai in Indiana. Surprisingly, the district court accepted that reading, and held that the law of each respondent's home state

would govern every claim against each respondent, regardless where the vehicle or tire was purchased.

On expedited appeal, a unanimous Seventh Circuit panel corrected that obvious error, holding that under Indiana choice-of-law rules, the laws of the state in which a product was purchased must be applied to tort and contract claims arising out of the purchase. Thus the laws of not just one jurisdiction, but of all 51, would apply to the class claims against each respondent. Because the Seventh Circuit agreed with the district court that those different sets of laws varied too much to allow for nationwide class treatment of petitioners' claims, it held that the class certification order was erroneous.

To forestall further litigation in the district court and another appeal over whether 51 statewide classes would be proper, the court of appeals went on to address respondents' other objections to the class certification order. The court of appeals agreed with respondents that factual variations among the claims of individual class members – including differences in the configurations of the individual vehicles and tires at issue, differences in usage patterns, and differences in purchase circumstances – rendered the claims insufficiently common in their factual dimensions to justify treatment on a classwide basis, even if common questions of law had predominated. Finally, the court of appeals cautioned courts not to repeat the district court's error of dispensing with Rule 23's important legal and factual commonality requirements merely to avoid hundreds of smaller, individual claimant cases in multiple jurisdictions.

The decision of the court of appeals could hardly be more fact-bound or state-law intensive. To the extent that the decision below rests on federal-law premises, those premises are entirely uncontroversial: all circuits agree with *both* courts below that nationwide class actions must be premised on laws that do not differ materially, and all cir-

cuits agree with the court of appeals that the fundamental requirements of Rule 23 cannot be disregarded simply to avoid multiple trials on small-value claims. Certiorari should be denied.

OPINIONS BELOW

The petition's recitation of the relevant opinions below omits mention of the district court opinion setting forth the choice-of-law ruling that is the focus of the decision below. Nor is the opinion attached as an appendix to the petition. That opinion is reported at 155 F. Supp. 2d 1069 (S.D. Ind. 2001), and attached as an appendix ("App. A") hereto.

STATEMENT OF THE CASE

1. This action began with an investigation by the National Highway Traffic Safety Administration ("NHTSA") in May 2000 into the safety of certain tires manufactured by respondent Bridgestone/Firestone, Inc. ("Firestone"). Within weeks after Firestone announced a recall of some of the investigated tires in August of that year, over 100 purported class actions were filed against Firestone in state and federal courts around the country alleging that both recalled and unrecalled tires were defective. These lawsuits soon included Ford Motor Company ("Ford") as a defendant, and the complaints added a distinct set of allegations that all Ford Explorers (the primary vehicle model on which the recalled tires were installed) were defective because they were unreasonably prone to rollover accidents.[1] These cases generally

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[1] In May 2001, Ford launched a voluntary program to replace, free of charge, all of the remaining investigated tires that were sold as original equipment on Explorers and other Ford vehicles. Firestone agreed to replace another 3.5 million tires in October 2001 after NHTSA issued a preliminary defect determination regarding those tires. Several months ago, NHTSA considered and rejected the types of allegations asserted by plaintiffs against Ford. After an "extensive analysis of agency data and information provided by Ford and Firestone," NHTSA conclusively rejected the claim that "Explorers are defectively designed because they

excluded any individuals who had actually suffered personal injury allegedly attributable to the alleged defects. Instead, the theory of the lawsuits was that product purchasers who had not suffered any personal injury, or even any manifestation of the asserted product defect (i.e., a tread separation or rollover event), had still suffered an economic injury in the form of "overpayment" for their products. *See* Pet. 4.

2. All of the actions pending in federal courts were transferred to the Southern District of Indiana under the multi-district litigation ("MDL") statute, 28 U.S.C. § 1407.[2] In January 2001, petitioners filed a master complaint in the district court combining the allegations of the class actions consolidated there. The master complaint listed 235 named plaintiffs suing on behalf of themselves and multiple putative classes and subclasses and asserted 14 distinct legal claims under state and federal law premised upon various allegations of product defect, misrepresentation, and omission.

a. Respondents moved to dismiss the master complaint. To rule on that motion, the district court was required to determine what law to apply to claims arising out of purchases in many different state jurisdictions. Applying the settled rule that "before 'entangling itself in messy issues of conflicts of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states,'" App. 4a (quoting *Jean v. Dugan*, 20 F.3d 255, 260 (7th Cir. 1994)), the court held that "the relevant substantive laws . . . are sufficiently different to require a choice of law analysis," *id.*

To conduct that analysis, the court purported to follow

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have an inadequate margin of control for an average driver following a tread separation incident." Press Release, NHTSA, "NHTSA Denies Firestone Request for Ford Explorer Investigation" (Feb. 12, 2002).

[2] Several putative class actions asserting similar claims on behalf of similar classes remain pending in various state courts.

the choice-of-law rules of Indiana, the forum state for the master complaint. *Id.* at 5a; *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Indiana courts apply a version of the familiar *lex loci delicti* test to determine the law applicable to tort claims: the law of the "place of injury" governs, unless that place is "insignificant" to the tort. Pet. App. 4a (citing *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987)); *see Land v. Yamaha Motor Corp.*, 272 F.3d 514, 516 (7th Cir. 2001); *Judge v. Pilot Oil Corp.*, 205 F.3d 335, 336-37 (7th Cir. 2000). Even though the place of injury for petitioners' tort claims was the place where the product was purchased – which is also where most purchasers resided, where price negotiations would have occurred, where point-of-sale advertising would have been placed, and where the product was to be used – the district court held that the place of purchase was "insignificant" to the purchase-based injury asserted by petitioners. App. 9a. Deciding that the "conduct of Defendants as manufacturers" was the only issue significant to petitioners' claims, the court held that the laws of each respondent's home state would apply to all tort claims, regardless of where the product was purchased and regardless of how that state's law would treat the purchase transaction. *Id.* at 12a-13a. Applying Michigan law to the claims against Ford and Tennessee law to the claims against Firestone, the court dismissed most, but not all, of the tort claims.

Indiana courts apply the RESTATEMENT (SECOND) OF CONFLICT OF LAWS choice-of-law rule for contract claims: the law that governs is the law of the state with the most "intimate contacts" to "the transaction," as determined by such factors as the place of contracting, negotiating, and performance, location of the transaction's subject matter, and locations of the parties. *Nucor Corp. v. Aceros y Maquilas de Occidente*, 28 F.3d 572, 581-83 (7th Cir. 1994) (citing *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (Ind. 1945)); *see Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855

F.2d 406, 412-13 (7th Cir. 1988). Even though essentially all those factors directly point to the law of the place of purchase, the district court again ruled that the laws of each respondent's home state would apply to the contact claims against it. App. 15a-16a. Applying those laws, the court declined to dismiss any of the contract claims.

b. Several months later, the court issued an order on class certification. That order certified *three* nationwide breach-of-warranty/fraud classes. One class consisted of all current U.S. residents who owned or leased variously configured Ford Explorer models during the period 1991 to 2000. A second class consisted of all current U.S. residents who during the same period owned or leased vehicles of any kind equipped with a broad array of Firestone tires. A third, overlapping subclass consisted of all current U.S. residents who owned or leased Ford Explorers equipped with any of a wide variety of Firestone tires. *See* Pet. App. 73a-74a. The court rushed out its order "in aid of its jurisdiction," in an explicit effort to preclude a South Carolina state court from certifying a class of "South Carolina owners of Explorers equipped with Firestone tires." *Id.* at 72a n.1.

Over a month later, the court issued an opinion explaining its order. *Id.* at 14a. The court began its opinion by observing that the "choice of law determination" set forth in its earlier partial dismissal order "is an important element of the class certification analysis," and incorporated it by reference into the class certification opinion. *Id.* at 16a. Recognizing that the Seventh Circuit would have the opportunity to review the choice-of-law determination "as part of an appeal of the class certification ruling," the court rejected a request by Firestone for certification of an immediate interlocutory appeal of the choice-of-law ruling. *Id.*

The court made clear its view that Rule 23 was satisfied only because of its choice-of-law conclusion. Having already determined that the relevant laws of the various states

differ materially, App. 4a, the district court acknowledged that "common issues of law predominate" only *because* "all class members claims will be governed by the laws of Michigan and Tennessee," Pet. App. 40a n.17. "Due to our earlier choice of law decision," the court added, "this case does not involve the numerous subclasses on the basis of state law variation that plague the pursuit of class certification in many cases." *Id.* at 67a n.45. Applying one state's law to every claim against each respondent, the court determined that common issues of law predominated enough to satisfy Rule 23. *Id.* at 40a-60a.

The court reached the same conclusion with respect to common issues of fact. The court recognized that because petitioners' theory of economic injury in their claims against Ford turned entirely on whether Explorers are defective, *see* Pet. App. 40a (stating that petitioners' theory requires them to "prove that the products Defendants sold were defective and that the prices they paid for their products were therefore too high"), the key question on factual commonality was whether petitioners had advanced a defect theory that they could prove on evidence "applicable to all Explorers," *id.* at 42a. The one theory advanced by petitioners was that the so-called "Static Stability Factor" ("SSF") for Explorers is too low, while their "oversteer" is too high, creating an unreasonable propensity to roll over. Ford submitted evidence, wholly unrebutted by petitioners, establishing that SSF and oversteer vary substantially among the 44 different Explorer configurations at issue. Defs.' 7th Cir. Jt. App. 435-36, 461-80. The court nevertheless concluded that petitioners could prove an SSF/oversteer rollover defect on evidence common to every one of the Explorer configurations, pointing to evidence that Ford itself had allegedly treated Explorers similarly for certain purposes, Pet. App. at 42a-43a, though *none* of that evidence showed that Ford treated all Explorers the same with respect to their *SSF* or *oversteer* characteristics.

Having satisfied itself of legal and factual commonality, the district court concluded by addressing the question of "superiority" under Rule 23(b)(3). The court's analysis was guided by the firm belief that centralization of all claims in one forum would be the most efficient approach:

> In our view, class certification is the most appropriate means of continuing this litigation. As Plaintiffs note, without class certification, if individual Plaintiffs wish to continue pursuing their claims, either we must try hundreds of claims or we must remand them to the transferor courts who will then be faced with the need to try hundreds of cases. . . . Such a result would be immensely burdensome to the courts, parties, and witnesses. This would also create the risk of inconsistent results. And while these multitudinous lawsuits are clogging the courts, other litigants must wait and wait and wait.

Pet. App. 66a. The court concluded its opinion by holding that NHTSA's administrative mechanisms were not superior to centralization of all claims in the MDL proceeding, on the palpably incorrect ground that NHTSA has insufficient remedial power to resolve economic losses arising from alleged vehicle defects. *Id.* at 70a.[3]

3. Respondents petitioned for interlocutory review of the certification order under Rule 23(f). The Seventh Circuit granted review and promptly reversed.

a. The first ground for reversal was that the district court had erred as a matter of Indiana law in applying the law of

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[3] NHTSA is the federal agency specifically charged by Congress with identifying and remedying vehicle defects. If NHTSA finds a defect in a vehicle, NHTSA can force the manufacturer to repair the defect (eliminating any economic loss), to replace the vehicle with one that is defect-free (eliminating any economic loss), or to buy back the vehicle (eliminating any economic loss). *See* 49 U.S.C. §§ 30118-30120.

respondents' principal place of business, rather than the law of the place of purchase, to all the class claims. The court, per Judge Easterbrook, concluded that "[n]either Indiana nor any other state has applied a uniform place-of-the-defendant's-headquarters rule to products liability cases." Pet. App. 5a. Applying Indiana contract and consumer protection precedents holding that the sale of products within Indiana is governed by Indiana law (as opposed to the law of seller's home state), the court concluded that Indiana's "choice-of-law rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits." *Id.* at 8a.[4]

That conclusion left the question whether the 51 different state laws were sufficiently dissimilar that certification was precluded under Rule 23's legal commonality and manageability standards. The Seventh Circuit identified an analytical flaw in petitioners' "economic-injury-only" theory, *id.* at 6a & n.1, and observed that, because of the flaw, "most states would not entertain the sort of theory that plaintiffs press," *id.* at 7a (citing cases rejecting theory under laws of ten different states). The court did not address the merits of this theory under the laws of every state; rather, it was enough for purposes of its Rule 23 holding that "state laws about theories such as those presented by our plaintiffs differ," *id.* at 3a, as the district court had expressly held. Following numerous precedents rejecting the certification of other nationwide classes on the basis of state-law variations in the warranty and fraud claims asserted, *id.*, the court of appeals held that a proper application of Indiana choice-of-law rules compelled reversal of the class certification order, *id.* at 9a ("Because these claims must be adjudicated under

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[4] Were it otherwise, the court observed, Indiana would have to apply Korean law to the sale of a Hyundai car in Indiana, and French law to the sale of a Michelin tire in Indiana, an inconceivable result. Pet. App. 7a-8a.

the law of so many jurisdictions, a single nationwide class is not manageable.").

b. After correcting the district court's error of state law, the court turned to issues of factual commonality. *Id.* at 9a. Pointing to undisputed variations in the configurations, attributes, and purchase and use circumstances of the various vehicles and tires, *id.* at 9a-10a, the court held that those differences, as well as others too numerous too mention, "preclude any finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy,'" *id.* at 10a-11a (quoting Fed. R. Civ. P. 23(b)(3)). Given such a lack of legal or factual commonality sufficient to satisfy Rule 23, the court concluded that "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone." *Id.* at 11a.

c. The court of appeals concluded with three paragraphs responding to the district court's assertion that centralization of all claims in a single forum, for all-or-nothing resolution by a single lay jury, is more efficient than resolution through multiple, smaller trials or through NHTSA's administrative procedures. According to the court of appeals, the district court was wrong to believe that "efficiency" required the litigation to be centralized despite significant legal and factual variations among the claims. It is the "model of the central planner," the court observed, to ignore local legal and factual variation in favor of a one-size-fits-all resolution:

> The central planning model – one case, one set of rules, one settlement price for all involved – suppresses information that is vital to accurate resolution. What *is* the law of Michigan, or Arkansas, or Guam,

> as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from the state courts.

Id. In many situations, the court suggested, a "decentralized process" of multiple individual trials with different juries under different legal rules will lead to the more sensible social resolution. *Id.* at 12a (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995)).

But even if one objects to the "decentralized approach as an original matter," the court explained, *id.*, the fact is that both Rule 23 and principles of federalism forbid courts from centralizing millions of individual claims on a nationwide basis when there is legal and factual variation among the claims: "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and they must not be overridden in a quest to clear the queue in court. . . . Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)." *Id.* at 12a-13a.

Concluding that the district court had essentially altered Indiana choice-of-law doctrine to reach a legal commonality conclusion that would facilitate class treatment, the court of appeals reversed the certification order. Petitioners sought en banc review of the panel's unanimous decision; not one judge of the Circuit voted to review the decision.

4. In the wake of the Seventh Circuit's decision decertifying the classes, the so-called "negative value" of individual claims has not led to their withdrawal or demise, contrary to the ominous warnings of the petition. Indeed, petitioners recently submitted a proposal to the district court seeking trial on the individual claims of eleven plaintiffs.

REASONS FOR DENYING THE PETITION

The foregoing Statement, standing alone, amply demonstrates why the petition should be denied. Fundamentally, this is a case about the application of state choice-of-law rules. Nothing in the Seventh Circuit's holding or analysis is remotely controversial. Petitioners seem to recognize this, and do their best to ignore the holding and its true rationale. They propose four questions for review, all of which are drawn primarily from the opinion's more colorful rhetoric, and none of which addresses either the ruling on Indiana state conflicts law, or the ruling on factual commonality. The court's ruling on the state-law conflicts issue, of course, is no basis for certiorari. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Black v. Cutter Labs.*, 351 U.S. 292, 298-99 (1956); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938); *see generally* Robert L. Stern et al., *Supreme Court Practice* 226 (8th ed. 2002). Nor is its intensely fact-bound, case-specific determination that the many different vehicle and tire configurations involved in the class claims present individuated factual issues too varied to permit common, all-or-nothing, classwide adjudication. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Stern et al., *supra*, at 249. And whatever petitioners have to say about additional language in the opinion, "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311-14 (1987) (per curiam) (quoting *Black*, 351 U.S. at 297); *see Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions.").

Because petitioners do not even purport to seek review of the dispositive factual commonality ruling below, review of the questions petitioners do present could not change the result below. Certiorari should be denied for that reason alone.

See Stern et al., *supra*, at 231. But even on their own terms, none of petitioners' Questions Presented offer any basis for granting certiorari. The petition should be denied.

I. THE COURT OF APPEALS' LEGAL COMMONALITY DETERMINATION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The first Question Presented in the petition attacks the court of appeals' observation that "[n]o class action is proper unless all litigants are governed by the same legal rules." Pet. App. 3a. According to petitioners, that statement announces a rule that all litigants must be governed by *literally* the *exact same* rules before a class may be certified. In fact, of course, the opinion simply applies the wholly uncontroversial rule, previously articulated on numerous recent occasions by Judge Easterbrook himself, that if "recovery depends on law that *varies materially* from state to state," a nationwide litigation class cannot be certified. *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 746-47 (7th Cir. 2001) (citing *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001) (per Easterbrook, J.), *cert. denied*, 122 S. Ct. 1607 (2002); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (per Easterbrook, J.), *cert. denied*, 534 U.S. 951 (2002); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.) (per Posner, J.), *cert. denied*, 516 U.S. 867 (1995); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-34 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are *sufficiently cohesive* to warrant adjudication by representation." (emphasis added)). As the court of appeals observes immediately after the sentence quoted by petitioners: "State laws about theories such as those presented by our plaintiffs differ, and such differences have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes." Pet. App. 3a (citing *Mexico Money*, *Isaacs*, *Szabo*, and *Rhone-Poulenc*).

Importantly, the district court itself reached just the same conclusion, holding that the relevant state laws – if applicable under choice-of-law principles – differ too significantly to permit class certification. *Supra* at 6-7. The central question before the court of appeals was simply whether, as a matter of Indiana choice-of-law rules, each respondent's home-state law applied to all class claims – the ruling that the district court believed was the only way to establish legal commonality. When the court of appeals held that the district court's choice-of-law analysis was erroneous, the conclusion that the class claims lacked sufficient cohesiveness followed as a matter of course.

The court's state-law choice-of-law ruling is both unassailable and all but unreviewable. *See supra* at 12. Petitioners are therefore forced to argue that the conclusion of *both* lower courts that the tort and contract laws of the 51 relevant jurisdictions differ too significantly to satisfy the Rule 23 legal commonality requirement conflicts with decisions of other circuits. Petitioners are quite wrong.

The decision below is fully consistent with the broad consensus among the federal circuits that, outside of the settlement context, legal variations in different states' tort and contract laws typically preclude findings of commonality, predominance and manageability in nationwide and multistate class actions.[5] These conclusions are, of course, largely

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[5] *E.g.*, *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 n.44 (11th Cir.), *cert. denied*, 123 S. Ct. 117 (2002); *Stirman v. Exxon Corp.*, 280 F.3d 554, 565-66 (5th Cir. 2002); *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 n.13 (3d Cir. 2001); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187-90 (9th Cir. 2001); *Szabo*, 249 F.3d at 674; *Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 313-15 (5th Cir. 2000); *In re Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368-69 (E.D. La. 1997), *aff'd mem. sub nom. Bates v. Ford Motor Co.*, 174 F.3d 198 (5th Cir. 1999); *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1024-25 (11th Cir. 1996); *In re Am. Med. Sys.*, 75 F.3d 1069,

dependent on the particular facts alleged, the particular legal theories asserted, and the particular state laws invoked. Any differences in outcome in applying properly stated Rule 23 principles to such varying factual circumstances would not justify certiorari. *See* Stern et al., *supra*, at 250 (where asserted conflict "arises from mere differences in the factual situations, certiorari will be denied").

In any event, it is clear that the Third, Fifth, Ninth and D.C. Circuits have not departed from the broad consensus, as petitioners submit. Petitioners' reliance on the Fifth Circuit's decision in *Castano* and the D.C. Circuit's decision in *Walsh* is especially inapt. Just like the ruling below, each of those decisions *reversed* the certification of a nationwide class, each on the ground that the district court had failed to determine that the applicable laws of every state were sufficiently uniform to satisfy the commonality and manageability requirements of Rule 23. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-43, 749-50 (5th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-19 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *see also Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 313-15 (5th Cir. 2000) (reversing certification of nationwide class in no-personal-injury product defect case on ground of state-law variation); *Bates v. Ford Motor Co.*, 174 F.3d 198 (5th Cir. 1999) (affirming denial of nationwide product defect class involving Ford Bronco IIs premised upon the same alleged small-value claims and same alleged rollover defect asserted in this case on ground of state-law variation), *aff'g Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 368-69 (E.D. La. 1997).

Petitioners ignore the outcomes in *Castano* and *Walsh* and read them only for the proposition that a court must con-

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1085 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-43, 749-50 (5th Cir. 1996); *Rhone-Poulenc*, 51 F.3d at 1300-02; *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-19 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987).

duct an analysis of whether variations in state law affect predominance and manageability. Pet. 14. But that rule would create no conflict here, where both courts below *did* conduct such an analysis, and both agreed with the respondents' extensive submission demonstrating that the petitioners' individual causes of action vary significantly in their material elements from state to state. *See supra* at 6-7, 9-10; Defs.' 7th Cir. Jt. App. 280-316 (attached as "App. B").[6] At bottom, petitioners' claim of conflict with decisions of the Fifth and D.C. Circuits reduces to nothing more than petitioners' belief that the courts below erred in assessing the variations in state law. Petitioners are wrong, but no matter: their predictable disagreement with the courts' view of the effects of state-law variations on the particular facts and theories alleged here presents no recurring question of federal law worthy of review.

Petitioners' claim that the decision below conflicts with decisions from the Ninth Circuit, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), and the Third Circuit, *In re Prudential Ins. Co.*, 148 F.3d 283 (3d Cir. 1998), is also meritless. Those cases each involved the certification of a *settlement* class, not a class in which claims actually would have been tried. Such cases are not comparable, as the Third and Seventh Circuits have agreed. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("Although plaintiffs attempt to fit this case under *Prudential*, that case raised different issues because the class was certified for the purpose of settlement."); *Mexico Money*, 267 F.3d at 746-47 (variations in state law may be less consequential to certification of settlement class, where

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[6] In fact, virtually every state court to address "economic-loss-only" product-defect theories like petitioners' has flatly rejected them. *See infra* note 8. Petitioners therefore could not even show – as they must – that every state would actually recognize their theory, much less that every state would treat it in substantially the same way.

"no one need draw fine lines among state-law theories of relief"). Indeed, just like the Seventh Circuit in this case and others, the Third and Ninth Circuits have issued decisions rejecting efforts to certify nationwide *litigation* classes on the same state-law variation grounds underlying the decision below. *See Zinser*, 253 F.3d at 1185-86, 1188-1193 (9th Cir.); *LifeUSA Holding Inc.*, 242 F.3d at 148 n.13 (3d Cir.) ("The individual adjudications of causation, reliance, LifeUSA's multiple defenses, and application of differing state laws would make trying the plaintiffs' claims in a class action a thoroughly unwieldy endeavor and in the terms of *Georgine* make it impossible to conclude that this class action is superior to alternative means of adjudication."). Nothing in the decision below conflicts with these decisions,[7] and nothing about the Seventh Circuit's unremarkable application of Rule 23's commonality and manageability requirements merits review.

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[7] The Third Circuit's older decision affirming a nationwide asbestos class in *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986), reflects only a fact-bound difference in outcome, inappropriate for the exercise of certiorari jurisdiction. *See supra* at 12. What is more, in that case the court was explicitly "influenced" in its Rule 23 analysis "by the highly unusual nature of asbestos litigation," *id.*, an approach explicitly rejected in *Amchem*, 521 U.S. at 628-29 (refusing to depart from Rule 23 requirements even if "nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure"); *see* Pet. App. 13a ("Tempting as it may be to alter doctrine in order to facilitate class treatment, judge must resist so that all parties' legal rights may be respected."). An asserted conflict with "a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of the Supreme Court or other courts of appeals, as well as of the same court, will not be an adequate basis for granting certiorari." Stern et al., *supra*, at 230.

II. THE COURT OF APPEALS' OBSERVATION THAT REGULATION BY NHTSA IS A SUPERIOR METHOD OF ADJUDICATING DISSIMILAR CLAIMS DID NOT "USURP STATES' LAWMAKING POWER."

Petitioners' second Question Presented attacks the court of appeals' observations that compensating plaintiffs whose products have not suffered any defect manifestation results in excess compensation and overdeterrence, Pet. App. 6a, and that "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone," *id.* at 11a. Tying those two statements together, petitioners contend that the court of appeals violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), by supposedly finding NHTSA administrative regulation superior to adjudication of a state-law theory that results in overdeterrence. Pet. 19-20, 23.

Petitioners either badly misunderstand or baldly misrepresent the opinion below. The court of appeals did not decide that NHTSA regulation is superior because states *should not* recognize petitioners' theory. Rather, the court's critique of that theory was part of its analysis of legal commonality and manageability, where the court simply explained why most states *do not* recognize petitioner's theory. Pet. App 6a-7a. This was no mere supposition by the court; it cited numerous state-law cases so holding, *id.* at 7a, and there are indeed many, many more.[8] If most states do not recognize

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[8] Petitioners' contrary claim that all states recognize "no manifestation of defect" product claims as part of their warranty law, Pet. 21, is false. Petitioners outright ignore the many courts that have rejected "no manifestation of defect" claims whether the claims were brought as tort-based or contract-based causes of action. *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460 (D.N.J. 1998) ("In most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is ac-

petitioners' theory, then petitioners necessarily have failed to carry their burden of establishing that their claims would be recognized and treated the same in every state. Moreover, the court went on to hold that even if there were jurisdictions that would recognize a legal injury for an alleged product defect that has not manifested itself, the warranty and fraud law vehicles that would be invoked to vindicate that injury "vary considerably" among the states, "and courts must respect these differences rather than apply one state's law to sales in other states with different rules." Pet. App. 7a.

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tionable."); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 12, 16-17 (App. Div. 2002) (dismissing, *inter alia*, breach of implied warranty and consumer protection act claims because "it would be manifestly unfair to require a manufacturer to become [] an indemnifier for a loss that may never occur"); *Green v. Gen. Motors Corp.*, No. L-4643-99, 2002 WL 1575589, at *1-*2 (N.J. Super. Ct. Jan. 4, 2002) (rejecting claims under, *inter alia*, breach of implied warranty and consumer protection act because the product in question has "never . . . failed to work properly"); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 559-64 (N.D. 2002) (same for fraud and negligence claims); *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (same for breach of warranty, unjust enrichment, and fraud); *Yu v. IBM Corp.*, 732 N.E.2d 1173, 1177 (Ill. App. Ct. 2000) (same for breach of warranty and consumer protection act claim "[a]s plaintiff failed to allege that the Medic system actually malfunctioned and caused damages due to the Y2K defect"); *Nichols v. Gen. Motors Corp.*, No. 99-C-566, 1999 WL 33292839, at *3 (N.H. Super. Ct. Dec. 13, 1999) (same for, *inter alia*, breach of implied warranty and consumer protection act claims); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998) (dismissing tort and implied warranty claims because "[t]he absence of a manifested defect precludes a cognizable claim"); *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 172, 174-75 (S.D. Miss. 1996) (rejecting claims that roofs on sport-utility vehicles were defective where plaintiffs experienced no defects in their vehicles); *Am. Suzuki Motor Corp. v. Superior Ct.*, 44 Cal. Rptr. 2d 526, 529 (Cal. Ct. App. 1995) ("[I]n the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation."); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo. Ct. App. 1990) (same for failure to warn claims because plaintiff did not allege "failure or malfunction of the product").

If petitioners seriously believe the court based its view of NHTSA's superiority on a conclusion that applicable state laws are not wise enough for a federal court to follow in accordance with *Erie*, petitioners are seriously mistaken. What the court held, as part of its commonality and manageability analysis, is that state laws *must* be followed, and that such laws not only generally do *not* recognize petitioners' theory, but to the extent any do, such laws do not provide a basis for common, classwide adjudication of the theory. Yet again, closer scrutiny of petitioners' Question Presented reveals it to be nothing more than disagreement over a purely state-law issue: the court of appeals' entirely correct conclusion that most states do not recognize their theory. Petitioners' objection to this state-law conclusion does not raise any federal issue or implicate any circuit conflict. And petitioners simply ignore the court's distinct holding that the relevant state-law vehicles for adjudicating their theory would not permit sufficiently uniform treatment of all claims in the nationwide class in any event. The *Erie* issue petitioners raise is a figment of their imagination, not a basis for certiorari.

III. THE COURT OF APPEALS DID NOT RELY ON THE "SMALL VALUE" OF INDIVIDUAL CLAIMS TO DENY CERTIFICATION.

Petitioners next argue that by "us[ing] the small value of each individual class member's claim as a basis for denying certification," the court of appeals created a conflict with decisions of other circuits. Pet. 25. But the Seventh Circuit did not rely on the "small value" of individual claims to deny certification, and petitioners' conflict is again illusory.

Petitioners devote an entire Question Presented to the "small value" issue, but cite not one passage in the opinion that actually discusses the purportedly "small value" of the class members' individual claims. No such passage exists. Instead petitioners trot out the same combination of the court's "superiority" language and its observations about

overcompensation and overdeterrence that they rely upon for their second Question Presented. Pet. 25 (citing Pet. App. 6a-7a n.1 & 11a). Nowhere in either of these passages does the court of appeals make even a passing reference to the size of any of the petitioners' claims. The issue argued by petitioners is simply not presented by the opinion below.

In any event, there is no confusion in the lower courts about the significance of "small value" claims to the class certification decision. It is of course true, as petitioners emphasize, that Rule 23 is intended to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617. But that does not mean that *every* case involving small monetary claims can or should be tried as a class action. Small-value claimants, like any other claimants, must meet all of the requirements for class certification (*e.g.*, commonality, predominance and superiority) plainly set forth in Rule 23. Indeed, this Court has specifically rejected the idea that the "unambiguous requirement[s] of Rule 23" can be overlooked for the sake of permitting small value claims to be prosecuted as a class action, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974), and there is, not surprisingly, no circuit conflict on the point.

All of the circuits to which petitioners point for their "conflict" recognize that Rule 23 operates *both* to facilitate aggregation of small claims and *also*, through its requirements of commonality, predominance and superiority, to ensure that such aggregation occurs only when it would not deprive either plaintiffs or defendants of a fair opportunity to litigate individual claims or defenses. *See, e.g., In re Prudential*, 148 F.3d at 316 (certifying small-value claims only on finding of "sufficient unity so that absent members can fairly be bound") (quoting *Amchem*, 521 U.S. at 621); *Allison v. Citgo Petroleum*, 151 F.3d 402, 422 n.17 (5th Cir. 1998) (small-value claims may not be certified for settlement

where would result in "unfairness to all"); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005-06 (11th Cir. 1997) ("When there are no predominant issues of law or fact . . . class treatment would be . . . unjust, as the various factual and legal nuances of particular claims are lost in the press to clear the lone court's docket.").

The decision below is entirely consistent with this well-established understanding. The Seventh Circuit did not use the small size of the claims as a reason for denying certification despite Rule 23; if anything, it was the district court that used the small size of the claims as a reason for certification despite Rule 23. Beyond the Seventh Circuit's Indiana choice-of-law and factual commonality holdings, the court's discussion of the flaws in the certification order was devoted to explaining why Rule 23's important procedural protections could not be circumvented merely to facilitate nationwide class treatment of petitioners' claims. No circuit would tolerate the certification of a nationwide class that otherwise failed Rule 23's commonality and manageability requirements simply because of the size or nature of the individual claims; the Seventh Circuit's correction of such an error here merits approbation, not further review.

IV. THE COURT OF APPEALS' APPROACH TO EFFICIENCY IS CONSISTENT WITH RULE 23 AND THE DECISIONS OF OTHER CIRCUIT COURTS.

Petitioners' final Question Presented asks whether the court of appeals erred in "interpreting 'efficient adjudication' under Rule 23(b)(3) to require 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions.'" Pet. i. Once again, petitioners are arguing an issue that is not raised by this case. The Seventh Circuit did not, of course, hold that Rule 23 or its "efficiency" component "requires" decentralized trials. The court's discussion of efficiency merely reiterates the well-settled point that not every complex case is

handled "efficiently" by certifying a nationwide class, and that efficiency – on whatever model – cannot trump the plain requirements of Rule 23.

The court of appeals' treatment of efficiency comes in response to the district court's views on the subject. The district court had concluded that the only "efficient" disposition of these claims was by centralized trial in a single forum. The alternative of separate trials of individual claims, the district court believed, would be so inefficient that class certification was obviously superior: separate trials would "be immensely burdensome to the courts, parties, and witnesses," and would "create the risk of inconsistent verdicts." Pet. App. 66a. In the passage to which petitioners object, the court of appeals questioned the assumptions behind the district court's approach, observing that the "model of the central planner" will not always lead to more accurate and sensible resolutions than a decentralized process of multiple trials. *Id.* at 12a.

What is important here – and what petitioners neglect to mention – is that the Seventh Circuit expressly recognized that this issue is in any event resolved by the terms of Rule 23, as well as principles of federalism, which prohibit certification in the face of factual or legal variation regardless of purported "efficiencies." *Id.* ("No matter what one makes of the decentralized approach as an original matter, it is hard to adopt the central-planner model without violence not only to Rule 23 but also to principles of federalism."). The problem below, in other words, was that the *district court* had ignored fundamental Rule 23 principles in a myopic quest for "efficiency" in the litigation of petitioners' claims. As the court of appeals observed variously throughout its opinion:

> According to the district court, other obstacles (such as the fact that the six named tire models represent 67 designs for different sizes and performance criteria, and that half of all 1996 and 1997 model Explorers

> came with Goodyear tires) are worth overcoming in light of the efficiency of class treatment. Pet. App. 3a.
>
> [I]t is state law rather than a quest for efficiency in litigation (or in product design decisions) that controls. *Id.* at 5a.
>
> Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. *Id.* at 12a (citations omitted).

On top of those observations, the Seventh Circuit's discussion of the "market" model and "central planner" model of efficiency simply explains why the district court's emphasis on the supposed efficiency of centralization was misguided in theory, as well as misplaced in light of *Erie* and Rule 23. But the latter point is the only actual "conclusion about efficiency" (Pet. 27) adopted by the Seventh Circuit: the district court was not free to bend the state choice-of-law rules dictated by *Erie* or to disregard Rule 23's commonality requirements in the name of a purported "efficiency" goal.

That holding is obviously correct and entirely uncontroversial. The Court has made clear that a "one case, one court, one set of rules" approach, Pet. App. 11a, is precluded by *Erie* and Rule 23 where the applicable state choice-of-law rules do not support the streamlining of the litigation and where the circumstances and claims of individual plaintiffs differ from state to state and transaction to transaction. *See, e.g.*, *Amchem*, 521 U.S. at 620, 622-23 ("[O]f overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) ("constitutional limitations on choice of law" in the

class action context are "not altered by the fact that it may be more difficult or more burdensome to comply with th[ose] limitations" notwithstanding any "practical reasons" supporting a different approach). Nor is there any conflict on this point in the lower courts. To the contrary, both the circuits identified by petitioner, Pet. 29, adhere to the same principle adopted by the court below: district court discretion to advance policy goals through class certification is limited by the commonality requirements of Rule 23. *See, e.g., Zinser*, 253 F.3d at 1186 (9th Cir.) ("While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23."); *In re Am. Med. Sys.*, 75 F.3d at 1079 (6th Cir.) (same). Other circuits agree. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998) ("[A] class action may be the most economical and efficient means of litigation in many circumstances" but not where the "disparate nature of the claims precludes class treatment"); *Castano*, 84 F.3d at 752 (5th Cir.) (reversing class certification for lack of superiority because district court "ignor[ed] variations in state law and how a trial on the alleged causes of action would be tried").[9]

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[9] Midway though their final argument, petitioners recast it as one involving a conflict between Seventh Circuit panel decisions. Pet. 29-30 (arguing that decision below departs from the prior "teaching" of *Rhone-Poulenc*). Confusion within a single circuit, of course, is not grounds for granting certiorari. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). In any event, there is no such intra-circuit conflict, as reflected by the fact that not one Seventh Circuit judge voted to hear this case en banc when petitioners so moved. Pet. App. 77a. The panel below merely reiterated *Rhone-Poulenc*'s discussion of the benefits of decentralized litigation of mass tort actions involving plaintiffs with claims arising under different factual circumstances and different laws. Pet. App. 12a. Other aspects of *Rhone-Poulenc* also lend direct support to the panel's holding in this case. *Rhone-Poulenc*, 51 F.3d at 1302 (reversing certification of nationwide class because district court applied an "amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions" in violation of its *Erie* responsibility).

Petitioners seem to suggest, once again, that application of this well-established rule to small-value claims raises special problems for the lower courts. Pet. 29. But as discussed above, the circuit courts agree that small-value claimants are not exempt from the requirements of Rule 23. Any efficiencies that come from trying small claims together cannot be purchased at the price of Rule 23's procedural protections. *See supra* Part III; *see also LifeUSA Holding Inc.*, 242 F.3d at 148 n.13 (3d Cir.) ("Although plaintiffs' claims are relatively modest and separate suits may be impracticable, that factor by itself is insufficient to overcome the hurdles of predominance and superiority and efficient and fair management of a trial, which Rule 23(b) requires.").[10] The court of appeals well understood that important principle. That petitioners do not, or that they wish it were otherwise, is no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[10] As a matter of fact, petitioners are in no position to assert that the Seventh Circuit's approach to efficiency undermines their incentive to pursue their so-called "small value" claims, Pet. 29 – claims for several thousand dollars apiece, not including the attorneys' fees and punitive damages sought. Eleven of the plaintiffs petitioning this Court are currently pursuing the trial of their claims. Petitioners promised the Seventh Circuit that they would pursue their claims on an individualized basis if class certification was reversed, and they are making good on that promise. Even if there were some open question regarding the treatment of small-value claims under Rule 23 (which there is not), petitioners' own conduct reveals this case to be an exceptionally poor vehicle for addressing it.

Respectfully submitted,

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